IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 534 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX-III - Appellant(s)

Versus

AMBA IMPEX - Opponent(s)

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Appearance :

MR MANISH R BHATT for Appellant(s) : 1,

MRS SWATI SOPARKAR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 20/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. The appellant-revenue has proposed the following three questions.

"(A)Whether on the facts and circumstances of the case, and in law the Tribunal was justified in holding that the exchange rate difference pertaining to exports made in earlier years was ' profit business' within the meaning of Sec.80-HHC of the Act ?

(B)Whether on the facts and in the circumstances of the case, and in law the Tribunal was justified in holding that the issue was squarely covered by the decision of the jurisdictional High Court in the case of Hindustan Trading Corporation (160 ITR 15 (Guj)) when the issue before the High Court in the said case was totally different ?

(C)Whether on the facts and in the circumstances of the case, and in law the Tribunal was justified in holding that "any other receipt of a similar nature "as mentioned in explanation (baa) to Section 80-HHC (4B) would not include receipt on account of exchange rate difference ?"

1. After hearing Mr. M.R.Bhatt, the learned Senior Standing Counsel for the appellant on 15th November, 2005, notice had been issued to the respondent and accordingly Mr. T.P.Hemani appears on behalf of the respondent and has been heard. Considering the fact that the controversy between the parties lies in a narrow compass, and in light of the view that the Court is inclined to take, the appeal is taken up for final hearing and disposal today after order of admission.

2. Admit. The following substantial questions of law arises for determination.

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that exchange rate difference pertaining to exports made in earlier years would be "profits of business" within the meaning of Section 80-HHC of the Income Tax Act, 1961 ?

1. The assessment year is 2001-2002 and relevant accounting period is financial year 2000-2001. While framing the assessment order under Section 143 (3) of the Income Tax Act, 1961 (the Act) the Assessing Officer came to the conclusion that the exchange rate difference on export realisation for prior period i.e. up to 31st March, 2000, being Rs.13,18,068/=, was not an allowable deduction. The assessee carried the matter in appeal but did not succeed. Hence, the assessee preferred Second Appeal before the Tribunal. The Tribunal has upheld the claim made by the assessee on the basis of decision of this High Court in the case of Hindustan Trading Corporation vs. CIT (1986) 160 ITR 15 (Guj) by treating the receipt in question as being on revenue account. Tribunal has also placed reliance on various other decisions of different Benches of Tribunal.

2. Assailing the impugned order of Tribunal Mr. M.R.Bhatt, the learned Senior Standing Counsel for the appellant placed reliance on Explanation (baa) to Section 80-HHC of the Act to submit that profits of the business have to be computed and understood as provided in the said clause of the Explanation and no other receipts can be treated as profits of the business. It was further submitted that even if the said receipt, received on account of exchange rate difference, has been shown under the head "profits and gains of business or profession", the same has to be reduced as required by sub clause (1) of clause (baa) of the Explanation as it amounts to 'any other receipts'. He therefore urged that Tribunal had misdirected itself in holding that as the receipt was on revenue account, the same had to be treated as part of the business profits and the Explanation (baa) did not apply to such receipt.

3. As against that Mr. Hemani appearing on behalf of the respondent submitted that the case of the revenue was restricted to applicability of clause (baa) of the Explanation and in such circumstances the only dispute was as to whether the amount in question could be treated as other receipts of the nature envisaged by clause (baa) of the Explanation. According to him all other requirements of the provision stood satisfied and one had to proceed on the presumption that the amount received by way of exchange rate difference was relatable to the exports made by the assessee.

4. The entire case of revenue is built on the fact that the amount has been received in a year subsequent to the year of exports. As can be seen from the assessment order it talks of export realisation for exports made up to 31st March, 2000. There is nothing to indicate, and none of the authorities have applied their mind, as to whether the sum of Rs.13,18,068/= is relatable to exports made during only one financial year or more than one financial year preceding 31st March, 2000. This would have a material bearing, taking into consideration the provisions of sub Section (2) of Section 80-HHC of the Act as was applicable during the year under consideration.

5. Under sub Section (2) of Section 80-HHC of the Act, sale proceeds of goods or merchandise exported out of India and received in convertible foreign exchange become entitled to the deduction subject to fulfillment of other requisite conditions. Clause (a) of sub Section (2) of Section 80-HHC of the Act provides that such sale proceeds have to be received in convertible foreign exchange within a period of six months from the end of previous year or, within such further period as the competent authority may allow in this behalf. Thus, a plain reading of the provision makes it clear that once the competent authority has extended the time, in a case where it is necessary, or, where the sale proceeds have been received within a period of six months from the end of the previous year, such sale proceeds are directly relatable to the exports made and no further inquiry is necessary. Therefore, the entire controversy as to whether such receipt amounts to “any other receipt

“stipulated in Explanation (baa) (1) need not be taken up for consideration. Once legislature has provided for treating a receipt within a period of six months after the end of the previous year, or within further extended period, as sale proceeds relatable exports, it would not be open to revenue to raise such a controversy. The legislature in its wisdom has taken into consideration the fact that in case of exports made, sale proceeds are not necessarily realisable immediately within the accounting period in which exports have been made. As a corollary, by the time such sale proceeds are received within the prescribed time, by virtue of exchange rate difference there might be a situation where a larger amount is received than the amount as reflected in the shipping bill. Hence, merely because an amount is received in a year subsequent to the year of export by way of exchange rate difference, it does not necessarily always follow that the same is not relatable to the exports made.

6. As can be seen from the impugned order of Tribunal as well as the orders of Commissioner (Appeals) and the Assessing Officer, none of the authorities have approached the issue in light of provisions of sub Section (2) of Section 80-HHC of the Act. No evidence is available on record to establish fulfillment or otherwise, of the conditions stipulated by sub Section (2) of Section 80-HHC of the Act. In these circumstances, it would not be fair and just to either side to resolve the controversy in absence of the relevant facts and evidence being available on record.

7. In light of what is stated hereinbefore, the question is left unanswered and the appeal is restored to the file of the Tribunal only in relation to the issue relatable to deduction under Section 80-HHC of the Act without expressing any final opinion on merits of the matter. The Tribunal shall, after hearing both the sides, decide the appeal on this count, after permitting additional evidence on record, if necessary. It would also be open to the Tribunal to restore the issue to the file of the Assessing Authority to ascertain proper facts in the circumstances.

8. The appeal is accordingly disposed of. There shall be no order as to costs.

(D.A.MEHTA, J.)

(HARSHA DEVANI, J.)

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